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May 26, 1999

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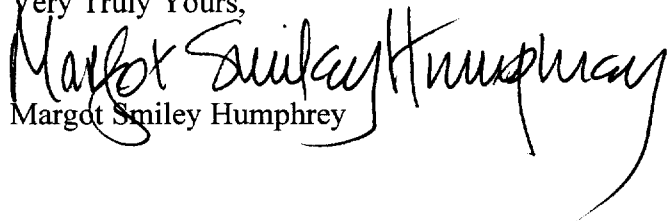
Re: CC Docket No. 96-98

Dear Ms. Salas:

Transmitted herewith, on behalf of the Rural Telephone Coalition (RTC), are an original and 12 copies of its comments in response to the Second Further Notice of Proposed Rulemaking (SFNPRM), CC Docket No. 96-98. In addition, a copy of the pleading is being sent electronically via the Internet.

In the event of any questions concerning this matter, please communicate with this office.

Very Truly Yours,

  
Margot Smiley Humphrey

Enclosure

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Before The  
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In Matter of )  
 )  
Implementation of the Local Competition ) CC Docket No. 96-98  
Provisions in the Telecommunications Act )  
of 1996 )

**COMMENTS OF THE RURAL TELEPHONE COALITION**

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COMMENTS OF THE RURAL TELEPHONE COALITION

The Rural Telephone Coalition (RTC), by its attorneys, submits these comments in response to the Second Further Notice of Proposed Rulemaking (SFNPRM) in the above-captioned proceeding.<sup>1</sup> The RTC is comprised of three associations: the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association (NTCA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO). The three associations' members include more than 850 primarily small and rural incumbent local exchange carriers (ILECs) that fulfill universal service responsibilities for about 5 million rural subscribers.

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<sup>1</sup>Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-70 (rel. April 6, 1999).

## Introduction and Summary

Once again, the “rural telephone companies” (rural ILECs) that comprise the RTC associations’ membership are faced with responding to proposals and questions -- which could have dire consequences for their small subscriber bases and low density service areas -- in a cloud of uncertainty and instability about what ground rules and policy imperatives apply to them. The SFNPRM is the result of the Supreme Court’s decision in AT&T Corp. v. Iowa Utilities Board.<sup>2</sup> The Court held that, although most of the Commission’s rules implementing §§251 and 252 of the Telecommunications Act of 1996<sup>3</sup> pass judicial muster, the Commission has not yet met the Act’s requirement to “determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the ‘necessary’ and ‘impair’ requirements.”<sup>4</sup> The Commission has consequently posed a host of questions on which unbundled network elements (UNEs) to require, what criteria to use and whether the minimum unbundling requirements should apply nationwide. Its questions focus on the “necessary” and “impair” standards for designation of unbundled network elements (UNEs), which the law says the Commission must, “at a minimum,” consider.<sup>5</sup>

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<sup>2</sup>119 S. Ct. 721 (1999) (Iowa Utilities Board).

<sup>3</sup>Telecommunications Act of 1996, Pub. L. No. 104-104, 110 stat. 56, codified at 47 U.S.C. §§ 151 et seq. (1996 Act).

<sup>4</sup>SFNPRM, §4, quoting Iowa Utilities Board at 736.

<sup>5</sup>47 U.S.C. § 251 (d)(2).

However, despite the Supreme Court's instruction to consider the Act's goals, the SFNPRM apparently does not intend to consider the "statutory objectives" relevant to companies that fall within the statutory definition of "rural telephone companies."<sup>6</sup> Given previous Commission actions still awaiting judicial review, the proposed omission will deprive states, rural carriers and their customers of safeguards, tailored to rural conditions, that Congress meant them to have. The Commission has already started this process by rewriting the §251(f) rural exemption standard and burden of proof, effectively depriving the States of any meaningful ability to weigh the rural statutory objectives before applying whatever nationwide unbundled elements the Commission may adopt in this proceeding to an individual rural ILEC. Moreover, the SFNPRM now threatens to impose on ILECs the burden of proof and the evidentiary burden for convincing the Commission to refrain from re-adopting the UNEs that were improperly adopted before and applying extraordinary new unbundling requirements. The result will be to impinge upon rural telephone companies' ability to run their businesses and serve their customers efficiently, again without the careful prior state scrutiny §251 ordains.

Rural differences are relevant for technical, economic and universal service reasons. The Commission should not adopt UNEs applicable to rural ILECs without (a) restoring state commissions' full statutory rural exemption authority over the application of any unbundling requirements at all in a rural ILEC's area or, at the very least, (b) thoroughly evaluating the

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<sup>6</sup>"Rural telephone companies" are defined in §3(47) of the 1996 Act, 47 U.S.C. §153(37), by four non-cumulative tests, of which two relate to low density and two relate to small size, based on access lines served.

impact of each such element on the different and varied conditions in rural ILEC study areas in light of the “statutory objectives” in § 251(f).

The Commission Should Not Readopt and Add to Its Nationwide Minimum UNE Requirements Without the Individualized Local Public Interest Scrutiny Congress Intended for Rural ILECs

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Rural ILECs and the areas they serve differ widely from non-rural ILECs and their service areas. Rural ILEC study areas also vary significantly from one rural ILEC or area to another. As discussed below in more detail, a rural ILEC’s network configuration is typically not similar to an urban network configuration. For example, rural ILECs frequently do not even provide for themselves certain functions the SFNPRM questions concern, or they provide functions in a much more labor-intensive and non-automated manner than large, urban-centered ILECs, that is far less amenable to mandatory unbundling.

Congress realized that rural differences are significant for purposes of applying the extraordinary and unprecedented statutory rights of access to a private business’s facilities and functions enacted by §251(c). As a result, it enacted the exemption in §251(f)(1) for all ILECs that qualify as “rural telephone companies.” Section 251(f)(1)(a) of the 1996 Act exempts rural telephone companies from the burdensome obligations of Section 251(c), the provision that requires non-rural ILECs to provide their competitors with interconnection and access to their facilities and services in order to stimulate and accelerate competitive entry. The rural exemption can only be terminated if (1) a carrier makes a “bona fide request” for interconnection and (2) the State commission determines that “such request is not unduly economically burdensome,” is “technically feasible,” and is otherwise “consistent” with certain universal service provisions of

Section 254.<sup>7</sup> Unlike the nationwide UNE list the Commission proposes here, the rural exemption requires individual company-by-company scrutiny by state regulators.

In its original Local Competition Order, the Commission considered -- but ultimately brushed aside -- arguments that its unbundling rules should recognize rural carriers' significant differences by pointing to the rural exemption provision in §251(f).<sup>8</sup> Said the Commission:

Finally, we have considered the economic impact of our rules in this section on small incumbent LECs. For example, we have considered the argument ... that unbundling requirements imposed on small incumbent LECs should differ from those imposed on large, urban incumbent LECs because of differences in networks and operational procedures. We reject GVNW's proposal for two reasons. First, some small incumbent LECs may not experience any problems complying with our unbundling rules. Second, we note that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.<sup>9</sup>

The Commission also considered and rejected arguments about "technological, demographic and geographic variations" at that time.<sup>10</sup> At this point, however, the Commission proposes to prescribe what elements ILECs subject to section 251(c) are required to unbundle on a nationwide basis, without leaving states reasonably free to make individualized determinations about the differences that set rural ILECs or rural places apart that it recognized were relevant when it adopted the minimum unbundled elements list the Supreme Court struck down.

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<sup>7</sup>47 U.S.C. §251(f)(1)(A).

<sup>8</sup>Implementation of the Local Competition Provisions of The Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd 15499, ¶ 247 (1996) (August 8 Order).

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.



At Present, the Rural Exemption Cannot Function as the Locally-Sensitive Safeguard Congress Enacted

The Commission has described the §251(f) safeguard as “provid[ing] an automatic exemption from section 251(c) for any incumbent LEC that is a rural telephone company.”<sup>11</sup> But its description is incorrect. Under its current interpretation of §251(f)(1), the Commission cannot rationally rely on the rural exemption to prevent harm to rural consumers or their local universal service providers where local conditions are different from large ILEC or nationwide average market facts. The 1996 Act establishes findings that states must make before terminating a rural ILEC’s rural exemption, including the absence of undue economic and adverse universal service impacts. These factors should also be considered in deciding what UNEs to require, as Congress manifestly believes these factors are relevant for the consumers and providers in areas served by “rural telephone companies.” The state role in making the fundamental determination of whether and when the stringent unbundling, resale and interconnection requirements reserved for incumbents will apply to rural ILECs at all ensures that the decision will be made by a body with knowledge of local conditions and local effects.<sup>12</sup> Moreover, the standard in the Act for terminating the rural exemption from unbundling and the other ILEC-only requirements

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<sup>11</sup>Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of The Communications Act, FCC 97-171, 12 FCC Rcd 6925, ¶5 (1997).

<sup>12</sup>The SFNPRM recognizes (¶ 12) that determining whether unbundling is appropriate is likely to be “fact-intensive,” but hopes to avoid time-consuming inquiries by prescribing the burden of proof and evidentiary standards.

expressly imports the universal service principles exactly as Congress enacted them.<sup>13</sup> Properly applied by the state regulatory body, the standard ensures that the interest of consumers in universal service is not eclipsed by the convenience of competitors.

Thus, from reading the statute, one would conclude that a rural ILEC ought not have to be concerned about even the nationwide, “one size fits all” unbundled elements the Commission has tentatively decided to adopt here until the regulatory body with local expertise decides that applying subsection (c) in its study area will not have significant adverse impacts on its customers or its financial position and is within the technical capabilities of its network configuration.

However, the “relief” available via the rural exemption and state review is currently shrouded in doubt, not “automatic” as Congress intended it to be. That is because the Commission decided in the August 8 Order and its original implementing rules to revise §251(f) by shifting the burden of proof for terminating the rural exemption to the exempted ILEC and substituting its own novel standard for economic harm onto the statutory test. These changes seriously undermine the automatic exemption and state-determined, locally-sensitive relief Congress intended. Instead of promoting Congress’s intent, the Commission has told the states that “Congress intended exemption ... of the section 251 requirements to be the exception rather than the rule ...,” so that a state should not retain an exemption after a bona fide request unless

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<sup>13</sup>In contrast, the universal service principle and standard excluded from the exemption termination test imported from §254 into §251 relate to matters the universal service provision leaves to Joint Board and Commission discretion -- authority which the Commission used to add “competitive neutrality” to the §254 principles .

the ILEC provides evidence to make a showing that satisfies the Commission's exemption standard.<sup>14</sup> Under the new test, the state may not simply decide whether subjecting the rural ILEC to UNES and the rest of §251(c) is "unduly economically burdensome," as Congress intended and the statute provides. Instead, the state must only consider whether the economic burden would "be likely" to rise to an ambiguous and unexplained level -- "beyond the economic burdens typically associated with efficient competitive entry."<sup>15</sup> The Commission's standard and burden of proof effectively convert the Act's "automatic" rural exemption into an exemption available only as an exception, as the Commission intended.

The issue of whether the revised exemption can be reconciled with the statutory exemption remains pending in the Eighth Circuit Court of Appeals. Chairman Kennard has publicly acknowledged that the rural exemption issues need to be reviewed promptly. He told rural telephone companies, "I pledge that we will work with you to bring clarity to this issue as soon as possible. We need to bring stability back to the marketplace."<sup>16</sup> Unfortunately, the exemption issues remain unresolved, and the rewritten exemption does not provide sufficient scrutiny for a nationwide UNE prescription.

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<sup>14</sup>August 8 Order at ¶1262.

<sup>15</sup>Ibid.

<sup>16</sup>Remarks of FCC Chairman William E. Kennard to NTCA, "A Networked Future for All Americans," delivered February 10, 1999.

### The Commission Must Apply a Rural-ILEC-Specific Standard and Reject Nationwide Proposals Unsuitable for Rural ILECs

The RTC urges the Commission to reexamine the rural exemption issues as soon as possible, without waiting for what could be prolonged judicial proceedings and deliberation on the merits of that and other questions. The Commission's reevaluation should lead it to restore the statutory safeguard of section 251(e) with a straightforward reading of the statute that places the burden of proof on the competitor and applies the three criteria for terminating the exemption as they are written in the law. Should the Commission fail to reexamine the rural exemption in time, the RTC believes that the Commission must expand the questions in this proceeding to include the economic, technical and public interest concerns made part of the relevant "statutory objectives" with respect to unbundling requirements that are likely to apply to rural ILECs and their customers, in the absence of meaningful scrutiny. Indeed, even if a rural ILEC's rural exemption has been terminated, the Commission must examine these statutory rural concerns if it imposes nationwide unbundling requirements that fail to take account of the different economic, technological and, above all, universal service impacts of nationwide requirements in rural ILEC study areas.

### Nationwide UNEs Are Not Suitable for Rural ILECs

Consideration of whether the proposed UNEs are appropriate for rural ILEC areas will require rejection of many of the UNE requirements the Commission expects to re-adopt, as well as the far reaching new UNEs it proposes to adopt on a nationwide basis. For example, the previously adopted OSS requirement is inappropriate for rural ILEC areas for the same reasons

that the Commission's proposed record-keeping and reporting rules for OSS are excessive for small and rural ILECs.<sup>17</sup>

The new proposed nationwide UNEs aimed at providing competitors access to advanced capabilities via ILEC networks also far overshoot the target for rural ILECs. For example, the SFNPRM proposes (§33) a nationwide minimum requirement for "sub-loop unbundling at the remote terminal or at other points within the incumbent LEC's network," ignoring the significant differences in urban and rural loop design.

Urban loop design uses feeder cable from the cable vault out to designated Standard Area Interfaces (SAI). This feeder cable is likely to be in conduit. From the SAI, copper distribution plant is extended to the customer interface. In rural areas, there essentially are no SAIs, no feeder cable and very little conduit. The cable extending directly from the office is distribution cable. It is not practical for a CLEC to "tap in" at some mid-point in the cable run, from either the CLEC or the ILEC perspective. Loop plant, for rural companies, is managed to reflect this design. Consequently, the network provisioning systems will not accommodate separate provision of feeder and distribution segments, but instead can only accommodate a distribution segment extending from the office to the subscriber. Therefore, the proposed sub-loop unbundling requirement based on a minimum national prescription should not be imposed on rural ILECs.

It would also be unreasonable to require ILECs, and particularly rural ILECs, to provide Operator Services and Directory Assistance (OS/DA) as UNEs. OS/DA are obviously available

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<sup>17</sup>One clear example of such differences is the different means by which most rural ILECs provide their Operations Support Systems (OSS). See Comments of TDS Telecommunications Corporation, Performance Measurements and Reporting Requirements or Operations Support Systems, Interconnection and Operator Services and Directory Assistance, CC Docket No. 98-56, RM-9101 (filed June 1, 1998).

from sources outside the incumbent's network. Independent ILECs have typically found that it is not cost-effective to provide OS/DA for themselves. Consequently, they contract to obtain OS/DA from outside sources (typically a neighboring RBOC or GTE). A competitive entrant that cannot cost-effectively provide OS/DA for itself will be in the same position as the rural ILEC. It will have to obtain OS/DA from an outside source. It would make no sense to mandate that a rural ILEC, which cannot cost-effectively provide OS/DA to itself, must somehow provide OS/DA to its competitor on an unbundled basis. Requiring OS/DA in areas served by rural ILECS thus cannot be efficient, since rural ILECs are not capable of providing OS/DA to anybody on a cost-effective basis. Since rural ILECs have been obtaining OS/DA from outside sources for years, it would simply be irrational to assume that OS/DA services are not available from outside sources.

Thus, the SFNPRM is mistaken when it states that "... section 251(b)(3) requires all local exchange carriers to provide operator services and directory assistance (OS/DA) to competing providers of telephone exchange carriers." Section 251(b)(3) requires only that local exchange carriers "... permit all such providers to have nondiscriminatory access to ... operator services, directory assistance and directory listing, with no unreasonable dialing delays" (emphasis added). No access is necessary when the ILEC is already using an outside source.

Extending to rural ILECs these requirements and the proposed requirement for providing and conditioning loops for a competitor to use for advanced services also conflicts with §706 and the statutory commitment to nationwide advanced services and "reasonably comparable" rural and urban rates, services and access to advanced telecommunications and information services.<sup>18</sup>

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<sup>18</sup> 47 U.S.C. §254(b)(2) and (3).

Section 706 calls for "removing barriers to infrastructure investment." Low customer density and inherently limited traffic volumes already stand as barriers to infrastructure investment. Requiring rural ILECs to unbundle and discount advanced capabilities to their competitors can only magnify the market disincentives and frustrate the Congressional intent.

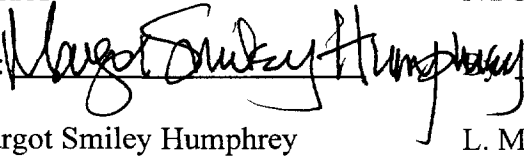
### Conclusion

For the above reasons, the Commission should reexamine and remedy its rural exemption standard and burden of proof to restore prior meaningful state scrutiny before any UNE requirement becomes applicable to any rural ILEC. In any event, it should consider the different impacts and implications of adopting and applying proposals to revive and expand UNEs to rural ILECs. Furthermore, rural-specific analysis can only justify a decision not to apply the UNEs discussed above to rural ILECs.

Respectfully submitted,


### **THE RURAL TELEPHONE COALITION**

#### **NRTA**

By:   
Margot Smiley Humphrey

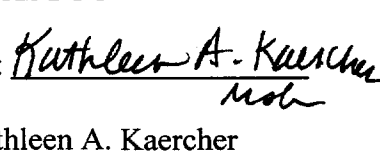
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### **CERTIFICATE OF SERVICE**

I, Victoria C. Kim, of Koteen & Naftalin, hereby certify that true copies of the foregoing Comments of the Rural Telephone Coalition on the Second Further Notice of Proposed Rulemaking (SFNPRM) have been served on the parties listed below, via first class mail, postage prepaid on the 26th day of May 1999.

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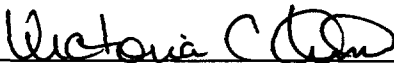
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